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IN THE

Supreme Court of the United States

October Term, 1959.

No. 521

PETER CASELLA,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1959.

No.

PETER CASELLA,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Peter Casella, your petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on October 12, 1959.

OPINION BELOW.

The opinion of the court below has not been officially reported (Appendix A, *infra*, p. 1a).

JURISDICTION.

The judgment of the Court of Appeals was entered on October 12, 1959 (Appendix B, *infra*, p. 2a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Where there is no evidence offered to show that narcotics had been illegally imported into the United States nor that the petitioner knew them to be illegally imported, and where the Government admits that petitioner had never been in physical possession of the narcotics, can petitioner's conviction be sustained solely on a showing that petitioner aided and abetted another defendant who was in possession of the narcotics, and is that showing sufficient to invoke the presumption of guilt set forth in 21 U. S. C. § 174, which is applicable only upon proof of possession?

II. Where the evidence shows only one sale of narcotics, can petitioner's conviction on four counts of an indictment, based on four separate statutory provisions, and four separate sentences thereunder, be sustained under the facts of this case, in which the evidence to sustain all four counts was identical?

STATUTES INVOLVED.

18 U. S. C. § 2 provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

21 U. S. C. § 174 of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of July 18, 1956, c629, Title I, Sec. 105, 70 Stat. 570, provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to

law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

26 U. S. C. (1952 ed. Supp. IV) § 4704(a), Sec. 4704(a) of the Internal Revenue Code of 1954 provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

26 U. S. C. (1952 ed., Supp. IV) § 4705(a), Sec. 4705(a) of the Internal Revenue Code of 1954 provides:

"General Requirements. It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order to the person to whom such articles is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF THE CASE

Petitioner Casella and defendant Santore were jointly indicted (R.[1] 3a-5a) on four counts and, after a jury trial, petitioner was convicted and sentenced on all four counts. He was sentenced to a term of fifteen years each on Counts 1 and 2, to be served concurrently with each other, and ten years each on Counts 3 and 4, to be served concurrently with each other and consecutively to the sentence on Counts 1 and 2. It was ordered that the total term of twenty-five years be concurrent with the first twenty-five years of the forty year sentence imposed by Honorable Gregory F. Noonan in the Southern District of New York on July 31, 1958.

Count I alleged that petitioner and Santore on January 23, 1958, did in Washington Township, New Jersey, fraudulently, knowingly, and feloniously sell, 172 ounces, 35 grains of heroin, and four jars containing opium, gross weight 49 ounces, 36 1/2 grains, "well knowing the same to have been fraudulently, knowingly, and unlawfully imported and brought into the United States contrary to law," in violation of 21 U. S. C. Sec. 174.

Count II alleged the same transaction as an unlawful receipt, concealment, and purchase in violation of 21 U. S. C. Sec. 174.

Count III alleged the same transaction and that the narcotics sold were not in or from the original stamped package, in violation of 26 U. S. C. Sec. 4704(a).

Count IV alleged the same transaction to be a sale of narcotics "not in pursuance of a written order on a form issued in blank for that purpose by the Secretary of the Treasury of the United States", in violation of 26 U. S. C. Sec. 4705(a).

---

1. "R" refers to the Appendix filed by the petitioner in the Court below and there designated Appellant's Appendix, a copy of which has been certified to this Court.

The Government's case was based on the testimony of two narcotic agents, Marshall and Picini, who testified that by prearrangement Santore delivered a carton to them at the King Cole Motel (R. 17a) in New Jersey, containing 5 kilos of heroin and four jars of opium on January 23, 1958 (R. 22a). This was the sole transaction on which all four counts were based and on which the sentences were imposed.

Marshall testified that he and Agent Picini met Santore in Philadelphia on October 16, 1957 to meet Santore's New York connections (R. 8a), and that the petitioner was introduced to the agents; the four men discussed terms for the purchase of uncut heroin (R. 10a).

On January 3, 1958, the agents met Santore, and were driven to Atlantic City, New Jersey, where they met petitioner (R. 11a) and the four drove to a restaurant in Pleasantville, New Jersey; that at the restaurant the petitioner urged them to take a large quantity of opium and heroin with delivery in about two weeks (R. 12a); that petitioner requested $1,500.00 to use in connection with a fight that he had been in, and Picini said he did not have the money on him; petitioner told them to give the money to Santore (R. 13a).

There was another discussion on January 8, 1958 at the King Cole Motel in New Jersey between the agents and Santore (R. 13a); the petitioner was said to be out of town making arrangements for delivery; that Picini paid $1,500.00 to Santore which was the amount petitioner had requested on January 3rd (R. 15a).

The petitioner and Santore met with the agents on January 14, 1958 at the King Cole Motel and thereafter went to the Folsom Inn where petitioner stated (R. 15a) "that arrangements had been made for delivery of the drugs, 200 cans of opium and 5 kilos of heroin, and that would take place on January 21, 1958"; the "New York boys" would deliver them to Santore who in turn would make delivery to the King Cole Motel (R. 15a). The agents

told petitioner and Santore that they "would pay anywhere between $8,000.00 and $10,000.00 at the time, the actual time of delivery, and additionally an additional $70,000.00 or so a few days later, and then the remainder" as the drugs were sold for a total price of $150,000.00 for both the opium and the heroin (R. 16a).

Marshall said that he phoned Santore on January 20, 1958 and was told that all arrangements were completed and that Picini and himself should wait at the motel on January 21, 1958 and telephone to Santore at 7:00 P. M. (R. 17a). The phone call as requested was made and the agents were informed that there would be a delay because the opium was still being cooked (R. 19a); that delivery would be made January 22nd at the King Cole Motel.

Santore phoned Marshall on January 22, 1958 at 7:00 P. M. and told him delivery would be made around 11:00 o'clock (R. 20a). Around midnight Santore called again and promised delivery of the drugs to the motel within one or two hours. Shortly after 2:00 A. M. Santore arrived at the King Cole Motel and delivered the carton containing drugs (R. 21a).

Petitioner did not deliver any heroin or opium (R. 23a, R. 40a), he was not at the motel at the time of delivery (R. 25a, R. 36a, R. 42a), he was not found in the possession of any narcotics (R. 24a, R. 25a, R. 36a), nor was any money ever paid to petitioner directly.

REASONS FOR GRANTING THE WRIT.

Important questions of federal criminal law involved in the enforcement of the narcotic laws, which are constantly recurring and are present in this case, require review by this Court.

I.

A. Petitioner is charged in the first two counts of this indictment with dealing in narcotics illegally imported and which he knew to be illegally imported. However, the Government offered not one word of evidence that the narcotics were illegally imported or that defendant knew them to be such. The Government tried this case and the Court submitted it to the jury solely on the theory that petitioner's guilt was proven by the presumptions arising from possession of the narcotics. However, not one word of evidence—direct or circumstantial—was offered to prove that petitioner ever had possession of the narcotics. On this subject the trial court charged:

> "There has been considerable comment, ladies and gentlemen, made that there is no showing that the defendant Casella ever had possession of the narcotics in question or that they were imported into the United States. I will now read to you section 2 of Title 18: 'Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal.' That means one who aids, abets, counsels, induces or procures another in the commission of a crime is just as guilty as one who actually performs the act. I have read to you the statute making one who aids, abets, counsels or procures another in the commission of a crime equally guilty as a principal, so, if you find that the defendant Santore had possession of the narcotics in question, and

you further find that the defendant Casella had knowledge of Santore's conduct, and that Casella aided and abetted Santore in carrying on such enterprise, then he, Casella, would be legally held to have possession of the narcotics the same as Santore. This, then, if you so find, would bring into full force and effect that portion of the statute that I have previously read to you: 'whenever on trial for a violation of this subsection, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be (377) deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.' So, ladies and gentlemen, if you find that the defendants had possession of the drug, you will then consider whether the defendant or defendants have explained their possession to your satisfaction, as required under the statute, and not concern yourself with the question of importation of the drug into the United States unless such importation would play some part in the explanation made by the defendants. If the explanation of possession made by the defendants is sufficient to raise in your mind a reasonable doubt as to the guilt of the defendants, then they would be entitled to a verdict of acquittal." (R. 93a-94a) [2]

Thus, this case poses squarely a question never decided in this Court—the question of whether the possession of one defendant is sufficient to make the statutory presumptions arising from possession applicable to co-defendants.

This Court has recently determined that direct evidence of possession is essential to take advantage of the presumption of Section 174. *Harris v. United States*, 359 U. S. 19 (1959). In that case this Court sustained a conviction and consecutive sentence under 21 U. S. C. § 174

2. The Court in its charge glossed over the question of control, but there was no evidence submitted on this fact. See *infra*, p. 10.

and 26 U. S. C. § 4704(a) arising from one transaction. There was direct proof of possession in that case. The Court used the words "direct evidence" seven times in that case in discussing the application of the presumptions arising from possession. In no case has this Court ever sustained a conviction resting solely on a presumption based on possession of a third party.

The Courts of Appeals likewise have refused to apply presumptions without direct evidence of possession by the person charged. See *United States v. Landry*, 257 F. 2d 425 (7th Cir. 1958) (the possession of narcotics by defendant's paramour held insufficient despite defendant's confession that the narcotics were his); *Jackson v. United States*, 250 F. 2d 772 (D. C. Cir. 1957) (heroin found in T. V. set in defendant's nephew's room held insufficient even though defendant owned key to front door and room). In *Willsman v. United States*, 286 Fed. 852 (8th Cir. 1923), defendant arranged a purchase of narcotics by an undercover Federal Agent from a third person. The Court held that without evidence that the third person was defendant's agent or partner, then the possession of the third person was not sufficient to invoke the presumption. Also see *Grantello v. United States*, 3 F. 2d 117 (8th Cir. 1924) (possession of defendant's estranged wife in defendant's former residence held insufficient to invoke presumption). Compare *United States v. Wainer*, 170 F. 2d 603 (7th Cir. 1948) (the evidence that defendant arranged purchase of beer by his brother's corporation held insufficient to constitute possession of said beer, which had been stolen in interstate commerce).

Those cases holding that circumstantial evidence of possession is sufficient to invoke a presumption are inapposite in this case. No circumstantial evidence of physical possession or control was here offered, nor was this case submitted to the jury on that theory. It is true that the Court did grant petitioner's request for charge on the question of control, as follows:

> "I will charge request No. 3, 'As I have instructed you, the statute which the defendants are charged with violating by the first two counts of the indictment, provides that whenever the defendants are shown to have or to have had possession of the narcotic drugs, such possession shall be sufficient evidence to authorize conviction unless the defendants explain that possession to your satisfaction. In that connection I charge you that possession of a thing means having in one's control or under one's dominion. It is not necessary that possession be immediate or exclusive.' " (R. 97a)

However, this was the only purported definition of control as constituting possession in the entire charge and the only mention of control during the course of the case. Such a charge was obviously insufficient to submit to the jury the question of whether control constitutes possession within the meaning of these statutes. While under some circumstances control may constitute possession, such control must constitute dominion over the narcotics themselves to constitute possession within the meaning of these statutes. Control over the incidents of sale and mechanics of delivery does not constitute sufficient control over the narcotics themselves to invoke the presumption. See *United States v. Landry, supra; Jackson v. United States, supra;* and *Willsman v. United States, supra.* Compare *Brown v. United States*, 222 F. 2d 293 (9th Cir. 1955) (dictum, since appellant Brown did have actual possession, handing two packets of heroin to the agent from a package he received from two women); *United States v. Hodorowicz*, 105 F. 2d 218 (1939) (involving contraband liquor).

The very concept of aiding and abetting negates the suggestion that petitioner controlled or exercised dominion over Santore and the drugs themselves. Aiding, abetting, counseling, commanding, inducing or procuring the commission of a crime is the converse of controlling or exercising dominion over a principal. Yet this was the only theory which was properly submitted to the jury in this case.

Criminal statutes must be strictly construed. Where possession itself is made a criminal offense, it is essential that defendant's possession be conclusively shown. *People v. Leavitt*, 301 N. Y. 113, 92 N. E. 2d 915, 917 (Ct. App. N.Y. 1950) and cases therein cited. This is of paramount importance where possession itself is made prima facie evidence of a criminal offense. Judge Learned Hand has noted, in a case involving the same defendant, that Section 174 creates more than a presumption.

> "As I read the paragraph, 'possession' by itself will support a conviction unless the accused 'explains the possession to the satisfaction of the jury', which in the end comes to saying that the burden of proof shifts to him to establish his innocence, once he is shown not only to be in 'possession' at the time of the forbidden dealings, but to have ever been in possession in the past. Assuming that such a statute would be constitutional which, I submit, is not wholly free from doubt, it appears to me that at least the language should be explicit that 'possession' has some other than the usual meaning. We must remember further that not only is this a criminal statute but that the penalties prescribed are extremely heavy". *United States v. Casella, et al.*, — F. 2d — (2nd Cir., October 2, 1959), Petition for Rehearing denied November 2, 1959.

Presumption cannot be constitutionally based on presumptions nor inferences on inferences. See *Rosenberg v. United States*, 120 F. 2d 935 (10th Cir. 1941); *United States v. Ross*, 92 U. S. 281 (1876); *Macket v. United States*, 90 F. 2d 462 (7th Cir. 1937). Therefore, the conviction of petitioner Casella on Counts I and II must be reversed.

B. Counts III and IV of this indictment charge sales of narcotics in an unlawful manner. However, possession of narcotics, together with the absence of appropriate tax-paid stamps, is prima facie evidence of that violation of

Section 4704(a). The trial court charged the jury that the possession of defendant Santore would be sufficient to hold petitioner legally to have possession the same as Santore if Casella aided and abetted Santore in carrying on such enterprise (R. 94a). This charge seemed to apply to *all counts*; the trial court did not attempt to distinguish between the various sections or the various counts in this respect.

Thus, the conviction of petitioner Casella on Counts III and IV should also be reversed.

II.

Petitioner was convicted on four counts of an indictment charging violation of four statutory provisions, and received four separate sentences, based entirely on evidence that petitioner aided and abetted defendant Santore in only one transaction, the sale of heroin and opium on January 23, 1958.

In *Blockburger v. United States*, 284 U. S. 299 (1932), this Court laid down the rule, followed in *Gore v. United States*, 357 U. S. 386 (1958) and *Harris v. United States*, 359 U. S. 19 (1959), that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied in determining whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Here it is true that each of the statutory provisions involved was involved in one of those three cases, and that this Court has suggested that each requires proof of some element which the others do not. However, in point of actual fact, the evidence offered to sustain the conviction on each count here *was* identical. The convictions here rested solely on the presumptions arising from possession of the narcotics—and not even the possession of the petitioner, but of the defendant he is charged with aiding and abetting. To sustain the imposition of four sentences, two of which are consecutive, under these circumstances would be harsh and unfair

and would violate the constitutional prohibition against double jeopardy. In addition, the submission to a jury of four counts based on one transaction clearly prejudiced petitioner, and the conviction on all four counts may have prejudiced him as to the severity of sentence imposed. See Note, 107 U. of Pa. L. Rev. 726 (1959).

It is true that this point was not stressed in the court below; however, that was due to counsel's belief that the *Harris* case, just decided prior to the filing of the brief below, precluded the Court of Appeals from coming to any other result. This Court, however, faces no such limitation.

In light of the seriousness of the question presented, it is respectfully submitted that this Court should review the sentences imposed in this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,852

UNITED STATES OF AMERICA

v.

JAMES SANTORE, PETER CASELLA

PETER CASELLA,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued September 24, 1959

Before GOODRICH, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 12, 1959)

PER CURIAM

The defendant was convicted of violation of the anti-narcotics laws. He presented no evidence at his trial. A number of matters have been urged as a basis for reversal. We have examined and considered all the points raised and find no error of which the defendant can justifiably complain.

The judgment of the district court will be affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,852

UNITED STATES OF AMERICA

v.

JAMES SANTORE, PETER CASELLA

PETER CASELLA,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

October 12, 1959

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PETER CASELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 63b)[1] is reported at 270 F. 2d 503.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1959 (R. 64b). The petition for a writ of certiorari was filed on November 10, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R. —a" refers to the appellant's appendix in the court of appeals; "R. —b," to the appellee's appendix.

QUESTIONS PRESENTED

1. Whether petitioner's constructive possession of narcotics sold by his agent is sufficient to render the statutory presumption of unlawful importation arising from possession applicable to him.

2. Whether the sentence imposed was lawful.

STATEMENT

A four-count indictment filed in the United States District Court for New Jersey on April 15, 1958, charged petitioner and James Santore with receiving (count II) and selling (count I) unlawfully imported narcotic drugs (21 U.S.C. 174) and with selling narcotic drugs which were not in the original stamped package (count III, 26 U.S.C. 4704) and which were not sold pursuant to a written order (count IV, 26 U. S. C. 4705) (R. 1a, 3a-5a). Following a jury trial, petitioner was found guilty as charged. On January 5, 1959, he was sentenced to fifteen years' imprisonment on each of counts I and II (the terms to be concurrent), and ten years' imprisonment on each of counts III and IV (the terms to be concurrent with each other but consecutive to the first two counts). The entire sentence was made concurrent with a forty-year sentence which petitioner had received on July 31, 1958, for other offenses (R. 2a-3a).[2] The court of appeals affirmed.

The evidence may be summarized as follows:

On October 16, 1957, federal agents Marshall and Picini met petitioner's codefendant, Santore, in Philadelphia, with a view to meeting Santore's "New York

[2] Affirmed by the Court of Appeals for the Second Circuit on October 2, 1959. See *United States* v. *Santore et al.*, No. 25330.

connection" (R. 8a). Soon thereafter, petitioner joined the group, telling the agents that he had already been informed by Mr. Santore that they were "interested in purchasing large quantities of heroin, pure heroin, * * *" (R. 9a). Petitioner said that he was able to supply from "half a kilo up to a ton of pure heroin" at a "price of $11,000 per kilo" (R. 10a).[3]

Intermittent contacts between the agents, petitioner, and Santore continued until January 3, 1958, when the foursome met for lunch near Pleasantville, New Jersey (R. 10a, 12a). At that time petitioner asked the agents "to take a quantity of smoking opium and 5 kilos of heroin, as soon as possible." When the agents agreed to purchase the heroin plus 200 cans of opium, petitioner asked for an advance of $1,500, to be deducted from the total purchase price (R. 12a). At petitioner's direction, the advance was given to Santore on January 8, 1958 (R. 13a, 15a).

On January 14, 1958, the agents met with petitioner and Santore to make final arrangements for the delivery of the narcotics. It was agreed that the narcotics would be delivered by Santore at a motel near Atlantic City, New Jersey, on January 21, 1958. Petitioner mentioned that on the night of the delivery "he was going to meet his New York suppliers or partners somewhere near the motel, and that the heroin and opium would be delivered or transferred to Santore's car" (R. 14b). The agents were to pay for the narcotics in installments (R. 15a-16a). Later, it became necessary to change the delivery time to the following night (R. 18a-19a).

[3] A kilogram is slightly more than 35 ounces (R. 10a).

At about 4:45 p.m. on January 22, 1958, the day of delivery, Santore parked his automobile in front of petitioner's residence in Ventnor, New Jersey (R. 16a-17a, 53a-54a, 6b-7b). The vehicle remained there until about 12:50 a.m. the following morning, when it was backed out of petitioner's driveway and driven off toward Atlantic City (R. 8b). At about 2:00 a.m., Santore, in the automobile, arrived at the delivery point with five kilos of heroin and four cans of opium. After Marshall and Picini examined the contents, Santore was arrested by other agents waiting nearby (R. 20a-22a). There were no tax stamps on the drug containers, and the agents did not furnish an order form to either petitioner or Santore (R. 22a-23a, 39a).

ARGUMENT

1. Petitioner's argument that the possession of narcotics by a joint actor is not sufficient "to make the statutory presumption arising from possession applicable" to an aider and abettor (Pet. 8) is unsupportable. Petitioner was the principal actor in the transaction, and his use of an intermediary in completing the transportation and sale of the narcotics did not mean that Santore's possession, and the presumption of illegal importation flowing therefrom,[4] cannot be imputed

[4] Petitioner's argument runs only to that portion of counts I and II alleging illegal importation, since there was direct evidence that the narcotics were received and then sold to the agents and that the drugs were not in the original stamped packages. Thus, the statutory inference of receipt or sale which 21 U.S.C. 174 provides shall be drawn from the unexplained possession of narcotics, and the statutory inference of sale without stamps which 26 U.S.C. 4704 provides shall be drawn from the unexplained possession of narcotics without stamps, only buttress the direct evidence as to those elements of counts I-III. There is no statutory inference arising from possession as to the order form provision in 26 U.S.C. 4705 (count IV).

to him. From the very beginning of the negotiations it was perfectly clear that petitioner, not Santore, was in command. It was petitioner who had a source of supply, negotiated the terms of sale and delivery, and was to receive the proceeds. The fact that he used Santore as his instrument in consummating the delivery does not permit petitioner to evade the consequences that would follow if petitioner acted directly.

18 U.S.C. 2 provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense, or "willfully causes an act to be done which if directly performed by him or another would be an offense," is punishable as a principal.[5] Thus, to be liable as a principal it is necessary only that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U.S. 613, 619, quoting *United States* v. *Peoni*, 100 F. 2d 401, 402 (C.A. 2); see *Pereira* v. *United States*, 347 U.S. 1, 9-11.

The venture in which petitioner associated himself was to buy and sell illegally imported narcotics without an order form and without tax stamps. Petitioner as an aider and abettor stood in Santore's shoes. When Santore bought and sold illegally imported drugs, that act was petitioner's. Personal custody or manual possession of the narcotics by the aider and abettor is not essential in order to bring the presumption of unlawful importation into operation against him. His construc-

[5] The trial court gave full instructions on aiding and abetting, as well as instructions on possession and constructive possession (R. 93a-94a, 97a, 98a).

tive possession, as in this case, is enough. *United States* v. *Moia*, 251 F. 2d 255 (C.A. 2); *United States* v. *Cohen*, 124 F. 2d 164 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811.[5] Were it otherwise, a principal would be subject to a lesser liability than his agent.

2. *a.* Petitioner asks this Court to reconsider and reverse the rule laid down in *Blockburger* v. *United States*, 284 U.S. 299, and reaffirmed recently in *Harris* v. *United States*, 359 U.S. 19, and *Gore* v. *United States*, 357 U.S. 386, but he does not offer any considerations not already considered and rejected by this Court. The *Gore* decision is bottomed on the assumption that the three offenses arose out of one act of sale. *Harris* deals with consecutive sentences imposed for purchasing narcotics not in or from the original stamped package and receiving and concealing the same drug knowing it to have been unlawfully imported, both arising from one act of possession. The constitutional argument of double jeopardy was also discussed and found wanting by the majority in *Gore* (357 U.S. at 392-393).

[5] The cases relied upon by petitioner are inapposite. *Harris* v. *United States*, 359 U.S. 19, 24, had nothing to do with the question whether constructive possession is sufficient to raise the presumption of unlawful importation; the phrase "direct evidence" or "direct proof" was there used only to distinguish the facts proved by evidence and those established by statutory presumption. Here, possession and sale by Santoro was proved by "direct evidence," and the only question is whether the statutory presumptions thereby created are applicable against his principal as well as against him. *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7); *Jackson* v. *United States*, 250 F. 2d 772 (C.A. D.C.); *Grantello* v. *United States*, 3 F. 2d 117 (C.A. 8); and *Wilkinson* v. *United States*, 286 Fed. 852 (C.A. 8), hold, on their separate facts, that there was insufficient evidence of constructive possession, but that does not mean that constructive possession, when shown, is not enough to raise the statutory presumption.

since the test of separateness of offenses is what elements must be established to convict, not what evidence is sufficient to establish them. It is therefore inappropriate to retrace here the ground already covered in *Gore* and *Harris*.

b. Yancy v. *United States*, No. 47, this Term, certiorari granted, 359 U.S. 941, involves consecutive sentences imposed on two counts charging, respectively, a purchase and a sale of the same quantity of narcotics on the same day, both in violation of the stamped-package requirement of the Internal Revenue Code. Had there been consecutive sentences on counts I and II, this case would have been analogous to *Yancy* in that counts I and II allege a purchase and a sale of the same quantity of narcotics on the same day, both in violation of 21 U.S.C. 174, dealing with unlawfully imported narcotics. Unlike *Yancy*, however, the sentences on counts I and II were concurrent, not consecutive. There is thus no reason to delay disposition of this petition until *Yancy* is decided, since the first portion of the sentence is supported by at least one good count. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *United States* v. *Sheridan*, 329 U.S. 379, 381.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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